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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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Ex parte Michael Lowry

On Appeal from the 230th Criminal Court
Harris County, Texas
Trial Court No.'s 1623191, 1685846.
Court of Appeals No. COA No. 01-20-00859-CR

MICHAEL LOWRY'S REPLY TO THE STATE'S PETITION FOR DISCRETIONARY REVIEW

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IDENTIFICATION OF THE PARTIES

The State's petition correctly identifies the parties.

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STATEMENT REGARDING ORAL ARGUMENT

Although Mr. Lowry argues that the State's petition should be denied because the State's arguments are based on factually incorrect foundations, if the petition is granted then oral argument may be helpful to understanding the First Amendment issues raised in this appeal.

INTRODUCTION

In 2017, the Texas Legislature created Texas Penal Code § 43.262 prohibiting the possession or promotion of lewd visual material depicting a child. Both the text of the statute and the legislative history make clear that section 43.262 proscribes visual material that is neither obscene nor child pornography. The Court of Appeals, in a well-reasoned and detailed opinion, found that section 43.262 was a content-based regulation on protected speech, that strict scrutiny therefor applied, and that the State failed to establish that the law served the State's compelling interest in protecting children from sexual abuse and exploitation.[1] The Court also found that the law was overbroad.

The State now seeks review from this Court. Each of the State's grounds for review rest upon the false factual foundation that section 43.262 only proscribes visual depictions of children involved in sexual acts or the false claim that Mr. Lowry did not preserve the overbreadth challenge for appeal. Because the State's arguments rely upon this faulty foundation, the petition should be denied. The petition should also be denied because the Court of Appeals' opinion does not

[1] As the Court of Appeals noted, before the District Court the State argued about the legality of a different statute, discussed an unrelated indictment, and failed to present any evidence regarding the link between child erotica and sexual abuse or exploitation. *Ex parte Lowry*, 01-20-00858-CR, 2021 WL 4953918, at *2, 11(Tex. App.—Houston [1st Dist.] Oct. 26, 2021, pet. filed).

conflict with the opinions of any other courts, all of the justices below agreed in the result, and because the Court of Appeals' well-reasoned decision was correct.

ARGUMENT

I. THE STATE'S ARGUMENT THAT THE RELEVANT PORTION OF SECTION 43.262 CRIMINALIZES ONLY CHILD PORNOGRAPHY IGNORES THE CLEAR TEXT OF THE STATUTE.

The parties and the Court of Appeals agree that the only portion of Texas Penal Code § 43.262 at issue is that which "prohibits a person from knowingly possessing visual material that depicts the 'lewd exhibition of the ... pubic area of a[ ] ... clothed child, who is younger than 18 years of age at the time the visual material was created,' that appeals to the prurient interest in sex, and has no serious literary, artistic, political, or scientific value." *Ex parte Lowry*, 01-20-00858-CR, 2021 WL 4953918, at *5 (Tex. App.—Houston [1st Dist.] Oct. 26, 2021, pet. filed)[2]; *See* State's Petition at 11, n.3. The State argues that this limited section of code prohibits only child pornography, and, therefore, section 43.262 regulates only unprotected speech. *See* State's Petition at 11-13.

The State's argument relies on the idea that section 43.262 only proscribes "visual depictions of children engaged in a specific, suitably limited range of sexual

[2] The opinion is included as Appendix A.

acts." *Id.* at 13. However, the State offers no argument to support their interpretation of section 43.262, and the Court of Appeals' opinion shows that the portion of the statute in question goes far beyond prohibiting only depiction of children involved in sexual acts.

First, the Court of Appeals discussed the plain meaning of the statute. *See* Appendix A at 12. The Court noted that "[a]lthough subsection (a)(1) of section 43.262 states that sexual conduct will have the meaning assigned in section 43.25, the remainder of section 43.262 does not use the term sexual conduct. It appears that 'sexual conduct' was used in the introduced version of section 43.262, but was removed prior to its enactment." *Id.* at n.10 ((*citing Compare* TEX. PENAL CODE § 43.262, *with* HOUSE CRIM. JURISPRUDENCE COMM., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017)). Had the legislature limited section 43.262 to depictions of clothed children involved in "sexual conduct" as defined by penal code section 43.25, then the state's reading of section 43.262 might hold up, but the statute as passed goes far beyond proscribing only depictions of children involved in sexual acts.

The Court of Appeals also noted that "[s]ection 43.262 does not state anywhere within the text that it prohibits child pornography." *Id.* at 18 (comparing section 43.262 to the child pornography statute). Noting that the statute did not

indicate whether it applied to child pornography, the Court turned to the legislative history. Specifically, discussing the statement of intent, the Court showed that the legislature was clear that it was outlawing speech which was not prohibited by any other Texas statute and which specifically was not child pornography. *Id.* at 18-19. The Court also discussed the text of section 43.262 and section 43.25 (related to child pornography) and discovered that section 43.262 encompassed the "lewd exhibition of the pubic area of a clothed child," which specifically did not fall within the statutory definition of a child pornography. *Id.* at 20. Of course, because the Legislature told us it was regulating speech which was not previously regulated, and because Texas already had child pornography laws, we know the statute regulated something other than child pornography. *Id.* at 19-20.

In short, the Court of Appeals' opinion found that "[t]he legislative history, caselaw, and statutes demonstrate that the visual material—child erotica images—prohibited by section 43.262 is distinct from child pornography and that the legislature sought to create a new statute to prohibit child erotica—visual material depicting the lewd exhibition of the pubic area of a clothed child." *Id.* at 20. The State's petition fails to show how the Court erred in making this finding.

Further, the State fails to show that section 43.262 prohibits only speech directly related to the sexual abuse of children. The Supreme Court has limited the

category of child pornography to material that documents the abuse of children. Because "laws directed at the dissemination of child pornography run the risk of suppressing protected expression" those laws must only proscribe "[t]he distribution of photographs and films depicting sexual activity by juveniles [and] is intrinsically related to the sexual abuse of children" because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation" and "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Id.* at 759.[3] Penal Code § 43.262 exceeds the definition of child pornography because, for example, a non-obscene picture of a clothed seventeen-year-old, posted online by that child, or texted to their significant other, simply does not harm the child even if the picture appeals to the prurient interest and lacks serious societal value.

The State's current argument hinges on the idea that section 43.262 only prohibits visual material depicting children engaged in a specific set of sexual acts, but this is incorrect. Section 43.262 prohibits a broad swath of visual images that

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[3] *See also Stevens*, which explained "[w]e made clear that *Ferber* presented a special case: The market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" 559 U.S. 471.

have nothing to do with sexual acts. The Court of Appeals did not err finding that section 43.262 prohibits speech other than child pornography.

II. UNDER STRICT SCRUTINY ANALYSIS, THE STATE FAILED TO MEET ITS BURDEN OF SHOWING THAT SECTION 43.262 FURTHERS A COMPELLING GOVERNMENTAL INTEREST OR THAT IT IS NARROWLY DRAWN.

The State's second argument, once again, relies on the mistaken belief that section 43.262 only proscribes images that "are sexually exploitive or abusive to children." State's Petition at 14. As discussed above, section 43.262 goes far beyond regulating images documenting the sexual abuse of children, otherwise the images in question would fall under the rubric of child pornography and strict scrutiny analysis would not apply. Because the section regulates visual images that are not child pornography, it necessarily regulates visual images which are unrelated to the sexual abuse of children.

The recent Netflix indictment shows that the statute regulates visual material that does not depict the sexual abuse of minors. 1 RR at 5; CR1623191 at 145-155. During the pendency of Mr. Lowry's case, Netflix was charged in Tyler County, Texas, for the promotion of lewd visual material related to the publication of its film "Cuties." *Id.* A news article published in the Texas Tribune explains the content of the movie, the purpose behind its creation, and the protections provided to its actors:

> While the film does not contain any underage nudity, it includes a minute-long scene with close-ups of the girls in the dance group gyrating their thighs, butts and stomachs, The Washington Post reported. The movie was shot with a counselor on set and got approval from the French government's child-protection authorities. The film's writer and director, Maïmouna Doucouré, has said "Cuties" is a critique of the hypersexualization of young girls.

Id. According to Thomas Leatherbury, the director of the First Amendment clinic at Southern Methodist University, "It's 'troubling' when there is a 'criminal charge related to First Amendment activity, particularly expressive activity, like a movie.'" *Id.*

Further, Section 43.262 makes felons of millions of viewers of TikTok and other social media platforms. Charli D'Amelio, age 17, for example, has amassed more than 100 million followers worldwide on TikTok. Ms. D'Amelio owes that following due largely to the hundreds of videos ("TikToks") she has created and posted on the platform, which often then find their way onto other online media outlets like YouTube. Like many of her fellow teen "content creators," Ms. D'Amelio's posts show her dancing to a variety of songs, including explicit ones, and in a variety of places wearing a variety of clothes, from baggy sweats in her room to bikinis by (or in) the pool (or her kitchen). Other aspiring young content creators on TikTok and similar media outlets try to draft off the successes of marquis stars like Ms. D'Amelio by "dueling" these bigger stars with videos of their own where they mimic the bigger stars' viral videos. These younger content creators have

posted videos of themselves dancing and "twerking" in various places, including their bedrooms, to music with explicit or suggestive lyrics. Multiple duels by multiple content creators are often compiled into one long-play video where minors like Ms. D'Amelio may occupy a handful of clips in a much larger reel with various dueling adults. Section 43.262 makes potential felons out of all the content creators, as well everyone who watches one of these videos. Clearly, the reach of section 43.262 extends beyond visual images of sexual abuse.

Because section 43.262 is a content-based regulation on protected speech, the Court of Appeals properly relied upon *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011) and other Supreme Court precedent in applying strict scrutiny analysis. *See* Appendix A at 24-28. *Brown*, like this Court's precedent, tells us that "[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless [the State] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." 564 U.S. at 799. "The State must specifically identify an 'actual problem' in need of solving" and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* (citation omitted). As noted by the Court of Appeals, "under strict scrutiny, the state 'bears the risk of uncertainty' and 'ambiguous proof will not suffice.'" *See* Appendix A at 27 (*citing Brown*, 564 U.S. at 799-800.)

Having identified the correct standard, the lower court then noted that "[h]ere,

unlike in *Brown*, the State did not present any evidence or studies to show that the prohibited visual material in section 43.262, which neither encompasses obscenity, nor child pornography, has a direct causal link to the State's compelling interest of preventing the sexual abuse or sexual exploitation of children." *Id.* at 27. The State, before the district court, simply failed to present the evidence necessary to satisfy strict scrutiny in this case, nor does the State explain in their current briefing how they met their burden. The Court of Appeals correctly ruled that "[i]f *Brown*'s rejection of competing psychological studies did not suffice, the State's proffer of no evidence to show how child erotica images cause sexual exploitation and sexual abuse of children does not rebut the presumption of the statute's invalidity and thus, the relevant language of the statute at issue here does not meet strict scrutiny." Appendix A at 28.

Even if the State had met their burden of proving a compelling government interest further by section 43.262, the State cannot show that the statute in question is narrowly tailored. The State must prove the law "employs the least restrictive means to achieve its goal. . ." *Ex parte Lo,* 424 S.W.3d at 19. A clearly less restrictive law would include *Miller*'s "patently offensive to community standards"

element as well as a scienter requirement.[4] It is inconceivable why the legislature removed both of these elements from the law prior to it being enacted. *See* Tex. H.B. 1810, Introduced, 85th Leg., R.S. (2017).

Another way the law could be more narrowly tailored is by including the affirmative defenses or defenses from the child pornography statute. The child pornography statute includes the affirmative defenses provided by § 43.25(f):

> (f) It is an affirmative defense to a prosecution under this section that:
>
> (1) the defendant was the spouse of the child at the time of the offense;
>
> (2) the conduct was for a bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; or
>
> (3) the defendant is not more than two years older than the child.

Tex. Pen. Code Ann. § 43.25. Including these affirmative defenses would solve many of the overbreadth problems discussed below. For example, the Tyler County District Attorney would not have committed a felony offense by admitting he watched the movies "Cuties," judges and lawyers would not risk prison for investigating a criminal case, and high school sweethearts would not risk a felony record for sending clothed but lustful pictures to each other.[5]

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[4] In *Ferber,* the Court specifically relied upon the fact that the statute "expressly includes a scienter requirement." 458 U.S. at 765.

[5] The Supreme Court reminds us that 17-year-olds, as much as we might wish otherwise, share something with adults: "Pictures of what appear to be 17–year–olds engaging in sexually explicit

The Court of Appeals did not err in holding that section 43.262 fails to pass strict scrutiny analysis.

III. THE VAGUENESS, OR OVERBREADTH ISSUE, WAS PRESERVED FOR REVIEW.

Before the Court of Appeals, in a footnote, the State argued that the "Appellant did not adequately develop a separation-of-powers argument in the trial court or on appeal." *See* State's Brief on Appeal at 30. This argument was easily dismissed by the Court of Appeals because Mr. Lowry raised the issue before the district court.

At the outset, it should be remembered that "'[a] party need not spout 'magic words' . . . to preserve an issue' as long as the basis of his complaint is evident to the trial court." *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012). The record makes clear that both the State and the trial court understood that the vagueness (or overbreadth) argument was being made. The Supreme Court often equates the vagueness and overbreadth doctrines when discussing content-based regulations on speech. For example, in *ACLU*, the Supreme Court explained "the [statute in question] is a content-based regulation of speech. The vagueness of such

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activity do not in every case contravene community standards." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002).

a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997).

In his habeas application Mr. Lowry briefed the void for vagueness doctrine in general, and as related to the First Amendment. CR 685846 at 20-23. Mr. Lowry explained:

> Vague statutes can also violate the First Amendment. A statute is vague if it overly chills speech—that is, if it interferes with free speech rights by causing citizens to "steer far wider of the unlawful zone" than they otherwise would "if the boundaries of the forbidden areas were clearly marked. " *Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). The United States Supreme Court permits defendants "to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Id.* at 304.

Mr. Lowry gave specific examples of protected speech which might be regulated under section 43.262. *Id.* at 21-22 (discussing pictures of gymnast, models, and Instagram influencers). The issue was raised again in Mr. Lowry's "Notice of Additional Evidence" showing that Netflix had been prosecuted in Smith County for showing the movie "Cuties." *Id.* at 33-36. The issue was argued by counsel at the hearing before the district court. 1 RR at 8-9 ("There's also a First Amendment problem whenever a -- whenever a law involving speech is overbroad."). The prosecution recognized the argument, and responded "Your Honor, in closing, this statute is not overbroad." *Id.* at 18. Finally, counsel specifically requested and

received a ruling the "vagueness portion of the argument." 2 RR at 7-8. Mr. Lowry met requirements of Texas Rule of Appellate Procedure article 33.1(a)(1)(A) and (a)(2)(A), and for that reason the issue was preserved for review.

IV. THE COURT OF APPEALS CONSIDERED SECTION 43.262 IN ITS ENTIRETY WHEN CONDUCTING OVERBREADTH ANALYSIS.

The State argues the Court of Appeals failed to "identify the statute's true legitimate sweep" because "the panel failed to give due consideration to all of Section 43.262's elements in conducting its overbreadth analysis." State's Petition at 20. This is false.

According to the State, "the panel failed to give sufficient consideration to the elements requiring prohibited material to appeal to the prurient interest in sex and lack serious literary, artistic, political, or scientific value." *Id.* But the lower court specifically considered each of the elements: "As we explained above, section 43.262 prohibits a person from possessing visual material depicting the lewd exhibition of the pubic area of a clothed child, that appeals to the prurient interests in sex, and has no serious literary, artistic, political, or scientific value." Appendix A at 20.

The Court also specifically addressed the savings clause, explaining why it did not save the statute:

> Although the savings clause exempts visual material having serious literary, artistic, political, or scientific value, such exemptions matter little when a substantial amount of protected speech is still chilled in the process. *See Free Speech Coalition*, 535 U.S. at 255, 122 S.Ct. 1389 (stating that the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"); *Lo*, 424 S.W.3d at 22 (noting that supreme court upholds statutes prohibiting dissemination of material that is obscene for children, but will strike down, as overbroad, statutes that prohibit communication or dissemination of material that is indecent or sexually explicit).

Id. at 31. Once again, the State's argument rests upon a factual foundation which is incorrect.

The State does not dispute the "alarming breadth" of the statute. *Id*. at 32. The State does not dispute that "any person—man, woman, teenager, law enforcement, judiciary, or school administrator—" can be charged with a crime "as long as the person knowingly possesses visual material depicting the lewd exhibition of the pubic area of a clothed child younger than 18." *Id.* at 31. The State does not dispute that "[t]he statute does not differentiate if a teenager takes the offending photo of themselves, commonly referred to as a "selfie," and posts it publicly for anyone to see." *Id.* The State does not seriously dispute that the statute is overbroad or that it chills a substantial amount of protected speech.

The Court of Appeals did not err finding the statute overbroad.

PRAYER

The Court should deny the State's Petition.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been delivered to the Harris County District Attorney's office, on 1/25/2022, through the e-filing system.

/s/ Jonathan Landers

Jonathan Landers

CERTIFICATE OF COMPLIANCE

I certify that this brief, exluding caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues pressented, signature, certificate of service, certificate of compliance, and any appendix, is 3,333 words according to the Microsoft Word word count, with headings, footnotes, and quotations included in this word count.

/s/ Jonathan Landers

Jonathan Landers

APPENDIX: OPINION OF THE FIRST COURT OF APPEALS

Opinion issued October 26, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00858-CR

NO. 01-20-00859-CR

EX PARTE MICHAEL LOWRY, Appellant

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1623191 & 1685846

O P I N I O N

Appellant, Michael Lowry, challenges the trial court's order denying his pretrial writ of habeas corpus application.[1] In two issues on appeal, appellant

[1] *See* TEX. CONST. art. I, § 12; TEX. CODE CRIM. PROC. arts. 11.01, 11.05.

argues that section 43.262 of the Texas Penal Code is facially unconstitutional, overbroad, and void for vagueness.

We reverse and remand.

Background

Based on investigations by the Montgomery County District Attorney's Internet Crimes against Children Task Force, the Department of Homeland Security, and the Texas Department of Public Safety, law enforcement discovered child pornography and child erotica on appellant's phone.[2] On March 1, 2019, the State charged appellant with possession of child pornography.[3] Later, on July 11, 2019, the State charged appellant in trial court cause number 1623191 with possession of lewd visual material of a child.[4]

Appellant filed an application for a pretrial writ of habeas corpus, arguing that section 43.262 is unconstitutional on its face[5] and violates the First and Fourteenth Amendments to the U.S. Constitution because it "(1) regulates a

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[2] Because appellant makes a facial challenge to Texas Penal Code section 43.262, the specific facts of his case are irrelevant. *See Ex parte Lo*, 424 S.W.3d 10, 14 n.2 (Tex. Crim. App. 2013).

[3] *See* TEX. PENAL CODE § 43.26.

[4] TEX. PENAL CODE § 43.262.

[5] *See Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014) (acknowledging defendant may file pretrial application for writ of habeas corpus to raise facial challenge to constitutionality of statute that defines offense charged). Appellant did not argue that the statute was unconstitutional as applied to him.

substantial amount of protected speech (speech which is neither obscene nor child pornography), and (2) is unconstitutionally vague." Appellant further argued,

> Fatal to § 43.262 is the fact that it outlaws speech which is neither child pornography nor obscene. For example, the law makes criminals of most Instagram 'social influencers' under the age of 18, who in reality do nothing more than post provocative, but clothed, pictures of themselves online for their millions of followers. Their promoters, from anyone establishing platforms for these images, to people who possess or even access these images are also guilty under § 43.262. And that is just one of many examples of the overly-broad sweep.

Appellant noted that section 43.262 would "punish, as a state jail felony" numerous Instagram "social influencers" and that that he could not visit the listed Instagram accounts for fear of "possibly committing a felony." Appellant broadly stated that "[t]he law potentially . . . outlaws . . . almost every teenage Instagram user in the United States in spite of the fact that the children . . . are in no way being harmed by posting their pictures on Instagram."

Appellant asserted that section 43.262's regulation of "visual material" is a content-based regulation. Although appellant acknowledged that obscenity is unprotected by the First Amendment, he asserted that the "obscenity carve out should not apply to . . . § 43.262 because it outlaws non-pornographic images." Appellant maintained that the "Texas legislature included the first and third limitations in § 43.262(b)(2)-(3), but *completely omitted* the second limitation that 'the work depicts or describes, in a patently offensive way, sexual conduct

specifically defined by the applicable state law.'" Appellant noted that the statute's omission conflicts with the supreme court's requirement that prohibited obscene speech be patently offensive. Appellant continued, "By omitting the 'patently offensive' requirement from [section] 43.262, the statute specifically permits prosecution for materials which certainly cannot be considered 'hard core sexual conduct.'"

To bolster his argument that the statute cannot be upheld, appellant asserted that the statute does not include a scienter requirement and that the State could not show that the law employed the least restrictive means to achieve its goals. Finally, appellant argued that section 43.262 is void for vagueness "because a person of ordinary intelligence is not on notice of what, exactly, subjects them to punishment."

On November 10, 2020, appellant filed a "Notice of Additional Evidence" to support his pretrial habeas application. Appellant asked the trial court to take judicial notice of a pending suit in Tyler County, Texas, in which a grand jury indicted Netflix for the promotion of lewd visual material depicting children[6] and that the prosecution of Netflix showed that section 43.262 is overbroad and

[6] Netflix streams the film *Cuties*, a film depicting an 11-year-old Senegalese immigrant who joins a dance group. *See* NETFLIX, http://www.netflix.com/title/81111198 (last visited Sept. 22, 2021).

unconstitutionally vague because "it overly chills protected speech and does not provide ordinary citizens fair notice of what the statute proscribes."

The State responded to appellant's application for writ of habeas corpus,[7] arguing that "Section 43.26 satisfies the State's compelling interest in protecting *all* children from sexual exploitation and the long-lasting harm that results from their depiction in child pornography."

During a Zoom hearing on the writ, appellant argued that section 43.262 regulates protected speech, it did not regulate obscenity because it lacked the patently offensive prong, and the section did not apply to regulate child pornography. Appellant contended that because the statute regulates protected speech and is a content-based restriction, strict scrutiny would apply. Appellant argued that the State had the burden to meet strict scrutiny and that it had failed to show that the statute was the least restrictive means to regulate speech. In arguing that the statute was not narrowly tailored, appellant pointed out that the introductory version of the statute applied to obscenity and contained a scienter requirement, but that upon the law's enactment, the obscenity and scienter requirements were removed. As an example of the overbroad reach of the statute,

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[7] The State's response appears to be a response to the constitutionality of section 43.26 and not section 43.262. The response erroneously refers to (1) a different indictment, (2) section 43.26 in support of its argument that section 43.262 is constitutional, and (3) arguments that appellant did not assert in his habeas application.

appellant informed the trial court of the prosecution of Netflix for showing a film "designed to actually protect children and to protest the oversexualization of children in our society." Appellant also argued that the statute was void for vagueness and that the statute overly chilled speech and "leaves too many people open to prosecution." By way of example, appellant argued that "anybody in Texas who watched that Cuties movie, would be open to prosecution including the DA of the county who brought the charges who admits he's watched that movie."

The State responded that section 43.262 was an additional child pornography prohibition statute that "works to prevent the sexual abuse or exploitation of children, which is a compelling interest and permits the State to have more leeway in drafting child porn statutes in order to protect children." The State further argued that the "statute's scope is limited to the depictions involving child sexual exploitation and/or abuse and a legitimate application under the First Amendment." In responding to appellant's vagueness argument, the State explained that perfect clarity is not required and that the "statute language is clear enough and sufficient to put anyone on notice on what is prohibited." Finally, the State argued that the statute is not overbroad and "is not protected by the First Amendment because this is obscene material."

Appellant responded by agreeing that "there's a compelling interest in protecting children" but "the problem is that this law is not narrowly drawn" and "it's not the least restrictive way to protect children."[8]

The trial court found that section 43.262 was a content-based regulation of speech requiring strict scrutiny review. The trial court noted that the State has a compelling interest in the protection of minors from sexual exploitation and believed that, even though the statute did not specifically state that it applied to patently offensive conduct, the language used in the statute—imagery of the genitalia or pubic area, whether clothed, unclothed or partially clothed—lays out patently offensive conduct. The trial court also noted that the public debate seems to be on whether the imagery "lacks serious literary, artistic or scientific value." The court also found that, taking the statute as a whole, the statute had a scienter requirement in subsection B that applied to the rest of the statutory text under B. Because the trial court found that the statute was narrowly construed and necessary to serve a compelling interest, the trial court denied the requested habeas relief.[9]

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[8] Appellant informed the trial court that it notified the attorney general's office that it was challenging the statute as unconstitutional and that the attorney general did not file a response. *See* TEX. GOV'T CODE § 402.010 (requiring party to notify attorney general when raising constitutional challenge to statute); TEX. CONST. art. V, § 32 (permitting legislature to require court to provide notice to attorney general of constitutional challenge).

[9] Because the record did not contain a signed, written order denying the application for writ of habeas corpus, we abated to the trial court. On October 19, 2021, a

Appellant appealed "from the order denying the pre-trial writ of habeas corpus in cause number 1685846 challenging the constitutionality of the charge pending in cause number 1623191."

Constitutionality of Section 43.262

A. Standard of Review

"[P]retrial habeas, followed by an interlocutory appeal, is an 'extraordinary remedy,' and 'appellate courts have been careful to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that in actual fact should not be put before appellate courts at the pretrial stage.'" *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (quoting *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)). "Pretrial habeas can be used to bring a facial challenge to the constitutionality of the statute that defines the offense but may not be used to advance an 'as applied' challenge." *Id.*

"Whether a statute is facially constitutional is a question of law that we review de novo." *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When the constitutionality of a statute is attacked, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *Id*. at 15. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. *Id*. However, when the government

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supplemental clerk's record containing the trial court's signed, written order denying habeas relief was filed in this Court.

seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. *Id*. "Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption." *Id*. (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004)). We apply strict scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content, and such regulations may be upheld only if it is necessary to serve a compelling state interest and employs the least speech-restrictive means to achieve its goal. *Ex parte Flores*, 483 S.W.3d 632, 639 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) and *Lo*, 424 S.W.3d at 15).

"Other types of regulations receive intermediate scrutiny, including content-neutral regulations of the time, place, and manner of speech, as well as regulations of speech that can be justified without reference to its content." *Id*. (citing *Turner Broad. Sys*., 512 U.S. at 642 and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "These regulations are permissible if they promote a significant governmental interest and do not burden substantially more speech than necessary to further that interest." *Id*. (citing *McCullen v. Coakley*, 573 U.S. 464 (2014) and *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014)).

As part of the constitutional analysis, we must first construe section 43.262 to determine what type of content it covers. *See Thompson*, 442 S.W.3d at 334; *Martinez v. State*, 323 S.W.3d 493, 504–05 (Tex. Crim. App. 2010); *see also Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018) ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.") (citing *United States v. Williams*, 553 U.S. 285, 293 (2008)).

To determine the meaning of the statute, we apply rules of statutory construction to the statutory text. *Wagner*, 539 S.W.3d at 306. We interpret the statute "in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not possibly have intended." *Id*. (citing *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999)). We must read words and phrases in context and construe them according to the rules of grammar and usage. *Id*.; *see* TEX. GOV'T CODE § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). "We presume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Wagner*, 539 S.W.3d at 306; *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017). "If the language of the statute is plain, we will effectuate that plain language without resort to extra-textual

sources." *Wagner*, 539 S.W.3d at 306; *Cary v. State*, 507 S.W.3d 750, 756 (Tex. Crim. App. 2016).

We look beyond the statute's text and context to discern its meaning only if the text does not bear a plain contextual meaning or if the text's unambiguous meaning would lead to "'absurd consequences that the legislature could not possibly have intended.'" *Timmins v. State*, 601 S.W.3d 345, 348 (Tex. Crim. App. 2020) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)). In those events, a court may consider extra-textual factors like (1) the object sought to be attained by the Legislature; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws on the same or similar subjects; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the title or caption, preamble, and any emergency provision. TEX. GOV'T CODE § 311.023; *Arteaga*, 521 S.W.3d at 334. When construing a statute in the face of a First Amendment challenge, courts have a duty to employ a reasonable, narrowing construction of a statute to avoid a constitutional violation if the statute at issue is readily susceptible to one. *Ex parte Perry*, 483 S.W.3d 884, 903 (Tex. Crim. App. 2016). Statutory construction is a question of law that we review de novo. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009).

B. Construction of Penal Code Section 43.262

Enacted by the Texas Legislature in 2017, section 43.262, titled "Possession or Promotion of Lewd Visual Material Depicting Child," provides:

> (a) In this section:
>
> (1) 'Promote' and 'sexual conduct'[10] have the meanings assigned by Section 43.25.
>
> (2) 'Visual material' has the meaning assigned by Section 43.26.
>
> (b) A person commits an offense if the person knowingly possesses, accesses with intent to view, or promotes visual material that:
>
> (1) depicts the lewd exhibition of the genitals or pubic area of an unclothed, partially clothed, or clothed child who is younger than 18 years of age at the time the visual material was created;
>
> (2) appeals to the prurient interest in sex; and
>
> (3) has no serious literary, artistic, political, or scientific value.
>
> . . .

[10] Section 43.25 defines "sexual conduct" as "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." TEX. PENAL CODE § 43.25. Although subsection (a)(1) of section 43.262 states that sexual conduct will have the meaning assigned in section 43.25, the remainder of section 43.262 does not use the term sexual conduct. It appears that "sexual conduct" was used in the introduced version of section 43.262, but was removed prior to its enactment. *Compare* TEX. PENAL CODE § 43.262, *with* HOUSE CRIM. JURISPRUDENCE COMM., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017).

> (d) It is not a defense to prosecution under this section that the depicted child consented to the creation of the visual material.

TEX. PENAL CODE § 43.262(a)(b), (d).

Visual material "means any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method. *Id*. § 43.26(b)(3). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist." *Id*. § 6.03(b).

Here, the State charged appellant with "knowingly possess[ing] visual material, namely, a photograph, that depicts the lewd exhibition of the pubic area of a clothed child who is younger than 18 years of age at the time the visual material was created, to wit: the visual material appeals to the prurient interest in sex, and the visual material has no serious literary, artistic, political, or scientific value." Thus, we confine our analysis to the portion of section 43.262 that prohibits a person from knowingly possessing visual material that depicts the "lewd exhibition of the . . . pubic area of a[] . . . clothed child, who is younger than 18 years of age at the time the visual material was created," that appeals to the

prurient interest in sex, and has no serious literary, artistic, political, or scientific value. *See United States v. Grace*, 461 U.S. 171, 175 (1983) (limiting review of statute's constitutionality under First Amendment to part of statute under which defendants were charged).

C. Does the First Amendment Apply to Section 43.262?

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment right to freedom of speech applies to the states by virtue of the Fourteenth Amendment. *Board of Educ. v. Barnette*, 319 U.S. 624, 638–39 (1943). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, (2002)). However, there are some "well-defined and narrowly limited classes of speech" that have been recognized as falling outside the protection of the First Amendment. *Stevens*, 559 U.S. at 468–72. These include child pornography, obscenity, defamation, fighting words, incitement, true threats of violence, fraud, and speech integral to criminal conduct. *See id*. Speech not within one of these narrowly defined categories is protected under the First Amendment, even if a legislature "concludes certain speech is too harmful to be tolerated." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011).

The State argues that the speech or conduct prohibited by section 43.262 does not fall within First Amendment protection. Instead, the State contends that section 43.262 prohibits obscenity and child pornography,[11] both of which are unprotected by the First Amendment. *See Stevens*, 559 U.S. at 468–72.

Generally, both the creation and dissemination of visual images are protected expression under the First Amendment. *See Brown*, 564 U.S. at 799–802 (holding law that imposed civil fines for the sale or rental of violent video games to minors impermissibly restricted protected speech); *Stevens*, 559 U.S. at 468–82 (holding statute criminalizing the knowing creation, selling, or possession of certain depictions of animal cruelty with intent to place it in commerce for commercial gain punished protected speech); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244–58 (2002) (holding statutory prohibition on possessing or

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[11] The United States Supreme Court has explained that "[c]hild pornography harms and debases the most defenseless of our citizens." *United States v. Williams*, 553 U.S. 285, 307 (2008). "[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *New York v. Ferber*, 458 U.S. 747, 759 (1982). Other courts have noted that "[t]he existence of and traffic in child pornography creates the potential for many types of harm in the community" and "presents a clear and present danger to all children." *United States v. White*, 506 F.3d 635, 649 (8th Cir. 2007) (Riley, J., concurring in part, dissenting in part) (quoting CHILD PORNOGRAPHY PREVENTION ACT OF 1996, Pub. L. No. 104-208, § 21, 110 Stat. 3009, 3009-26 (1996)). And, the Texas Court of Criminal Appeals has found that the "integral part of the offense of possession of child pornography" is the harm to each individual child. *Vineyard v. State*, 958 S.W.2d 834, 840 (Tex. Crim. App. 1998) (quoting *Ex parte Crosby*, 703 S.W.2d 683, 685 (Tex. Crim. App. 1986) (orig. proceeding), *overruled on other grounds by Ex parte Hawkins*, 6 S.W.3d 554 (Tex. Crim. App. 1999) (orig. proceeding)).

distributing "virtual child pornography," non-obscene sexually explicit images that appear to depict minors but which were produced using youthful adults or computer imaging technology, violated First Amendment); *Thompson*, 442 S.W.3d at 336–37 (holding that photographs and visual recordings, as well as purposeful creation of them, are inherently expressive and are protected by First Amendment).

Although section 43.262 is located in Chapter 43 titled "Public Indecency" and specifically under subchapter B, titled "Obscenity," we observe that section 43.262 does not prohibit obscenity. In *Miller v. California*, the supreme court defined obscenity as "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15, 24 (1973) (internal quotation marks and citations omitted). In accordance with *Miller*, section 43.21 of the Texas Penal Code defines obscene as material that the average person, applying contemporary standards, would find that taken as a whole appeals to the prurient interest in sex; taken as a whole, lacks serious literary, artistic, political, and scientific value, and depicts or describes (i) patently offensive representations or descriptions of

ultimate sexual acts or (ii) patently offensive representations or descriptions of "lewd exhibition of the genitals." *See* TEX. PENAL CODE § 43.21(1).

While it contains elements one and three of *Miller's* obscenity definition, section 43.262 omits element two—patently offensive conduct. *See Miller*, 413 U.S. at 24; s*ee also Free Speech Coalition*, 535 U.S. at 249 (stating that Child Pornography Prevention Act of 1996 ("CPPA") cannot be read to prohibit obscenity because it lacks required link between prohibitions and affront to community standards prohibited by definition of obscenity). Our conclusion that section 43.262 does not prohibit obscenity is also supported by the legislature's separate statutes that already prohibit obscenity. *See* TEX. PENAL CODE §§ 43.22 (prohibiting person from displaying or distributing obscene photograph), 43.23 (prohibiting person from possessing with intent to wholesale promote any obscene material), 43.21(a) (defining obscene, *inter alia*, to depict or describe patently offensive representations or depictions); *see also Free Speech Coalition*, 535 U.S. at 240 (noting that CPPA not directed at obscene speech because Congress proscribed those materials in separate statute). Had the legislature wanted to prohibit obscene visual material depicting children, the legislature knew how to accomplish that purpose. *See* TEX. PENAL CODE § 43.24 (in statute for "Sale, Distribution, or Display of Harmful Material to Minor," defining harmful material when dominant theme appeals to prurient interest of minor, in sex, nudity, or

excretion, is patently offensive, and is utterly without redeeming social value for minors).

We next determine whether the relevant language in section 43.262 criminalizes child pornography.[12] Section 43.262 does not state anywhere within the text that it prohibits child pornography. *Compare* TEX. PENAL CODE § 43.262 (prohibiting possession of visual material depicting lewd exhibition of pubic area of child), *with* TEX. PENAL CODE § 43.26 (prohibiting possession of child pornography). Instead, section 43.262 prohibits a person from possessing visual material that depicts the lewd exhibition of the pubic area of a clothed child, that appeals to the prurient interest in sex and has no serious literary, artistic, politically, or scientific value. TEX. PENAL CODE § 43.262.

Because the statutory text does not indicate whether section 43.262 applies to child pornography, we turn to the legislative history. House bill 1810's statement of intent provides, "Interested parties contend there is currently no disincentive for some criminals to possess or promote certain images portraying children depicted in a sexually suggestive manner." *See* SENATE RESEARCH CTR., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017). The statement of intent further provides,

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[12] "Whether an image falls within the statutorily defined category of child pornography under Texas state law is a question that must be answered on a case by case basis." *State v. Bolles*, 541 S.W.3d 128, 143 (Tex. Crim. App. 2017).

> Current state law does not contain statutes that criminalize the possession or promotion of child erotica images. Child erotica images portray an unclothed, partially[] clothed, or clothed child depicted in a sexually explicit manner indicating the child has a willingness to engage in sexual activity. Investigations of child pornography cases have revealed many child pornography collections also include child erotica images. In some cases, only child erotica images are discovered. In such instances, state charges cannot be pursued.

Id.

As explained by the legislative history, the visual material prohibited in section 43.262 does not fall within the current definition of sexual conduct for purposes of child pornography as found in section 43.26. Absent from the legislative history above is any reference that the visual material constitutes child pornography. The statutory text of section 43.262 prohibits a (1) a person; (2) from knowingly possessing; (3) visual material; (4) that depicts the lewd exhibition; (5) of the pubic area (6) of a clothed child; (6) which appeals to the prurient interest in sex; and (7) has no serious literary, artistic, political, or scientific value. *See* TEX. PENAL CODE § 43.262. Whereas, section 43.26 prohibits (1) a person; (2) from knowingly or intentionally possessing; (3) visual material that; (4) visually depicts a child younger than 18 years of age; (5) who is engaging in sexual conduct. For purposes of section 43.26, sexual conduct is defined as "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the

genitals, the anus, or any portion of the female breast below the top of the areola." TEX. PENAL CODE § 43.25(a)(2). Notably, the definition of sexual conduct in section 43.25, as applied to child pornography in section 43.26, does not include the "lewd exhibition of the pubic area of a clothed child."

Before the passage of section 43.262, Texas laws did not criminalize the possession of visual material depicting the lewd exhibition of the pubic area of a child, commonly referred to as child erotica images. *See Wise v. State*, 364 S.W.3d 900, 907 n.6 (Tex. Crim. App. 2012) (noting that state's expert defined child erotica as "a picture of a child either partially clothed or nude" that is not illegal); *Bolles v. State*, No. 07-08-0304-CR, 2010 WL 539684, at *2 (Tex. App.—Amarillo Feb. 16, 2010, pet. ref'd) (mem. op., not designated for publication) (noting that computer generated pictures depicting children in various sexual acts was termed "child erotica" and "child anime"); SENATE RESEARCH CTR., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017) (stating that charges for child erotica images could not be pursued). The legislative history, caselaw, and statutes demonstrate that the visual material—child erotica images—prohibited by section 43.262 is distinct from child pornography and that the legislature sought to create a new statute to prohibit child erotica—visual material depicting the lewd exhibition of the pubic area of a clothed child. Because section 43.262 prohibits visual material that is distinct from the sexual conduct defined in section 43.25 and

prohibited in section 43.26, and the legislative history indicates that the legislature wanted to prohibit child erotica, which was previously not illegal, we conclude that the visual material prohibited in section 43.262 is not child pornography and is therefore subject to First Amendment protection.

Were we to agree with the State that section 43.262 regulates child pornography, we would thus have to ignore the specific legislative history indicating that the present statute attempts to prohibit material that did not otherwise fall within existing statutes, i.e. section 43.26 prohibiting possession of child pornography. Furthermore, the State has not provided any authority that section 43.262 prohibits child pornography or obscenity.[13]

In sum, the legislature created a new statute to prohibit the knowing possession of visual material depicting the lewd exhibition of the pubic area of a clothed child that is neither obscene nor child pornography. Because the visual material prohibited by section 43.262 includes visual material that may be lewd but not within *Miller's* definition of obscenity or considered child pornography, we

[13] At the hearing on the writ of habeas corpus, the State argued that section 43.262 was "an additional child porn prohibition statute" which "works to prevent the sexual abuse or exploitation of children, which is a compelling interest. . . ." The State argued that the elements of the statute "show that the statute's scope is limited to the depictions involving child sexual exploitation and/or abuse and a legitimate application under the First Amendment." The State further argued that "this is not protected speech because it is an obscenity and First Amendment does not protect against obscenity. . . ." In closing, the State argued that the statute is not overbroad and not protected by the First Amendment because "this is obscene material."

therefore conclude that section 43.262 attempts to regulate visual material that is inherently expressive and that is protected by the First Amendment. *See Thompson*, 442 S.W.3d at 336–37 (holding that photographs and visual recordings, as well as purposeful creation of them, are inherently expressive and are protected by First Amendment); *see also Free Speech Coalition*, 535 U.S. at 251 (noting that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment"); *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) ("As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975) (stating that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them").

D. Is the Statute Content Based?

Because section 43.262 regulates expressive content protected by the First Amendment, we must next determine whether the statutory restrictions are content based or content neutral. A law is content-based if it "targets speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163

(2015). "If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, the regulation is content-based." *Lo*, 424 S.W.3d at 15 n.12. Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content neutral. *See Turner Broad. Sys.*, 512 U.S. at 642.

Here, the statute in question prohibits a person from knowingly possessing visual material that depicts the lewd exhibition of the pubic area of a clothed child that appeals to the prurient interest in sex and has no serious literary, artistic, political, or scientific value. *See* TEX. PENAL CODE § 43.262(b). It is the sexually-related nature and subject matter of the visual material sought to be proscribed that renders the statute content based. *See Thompson*, 442 S.W.3d at 348 (former subsection (b)(1) sought to prevent sexual content); *see also Lo*, 424 S.W.3d at 22–24 (discussing First Amendment protection of indecent sexual expression) (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997)). The statute neither applies to visual material that depicts only a person's arm, foot, neck or face, nor does it apply if the visual material does not appeal to the prurient interest in sex or has serious literary, artistic, political, or scientific value. *Ex parte Metzger*, 610 S.W.3d 86, 96 (Tex. App.—San Antonio 2020, pet. ref'd). By limiting the statute's prohibition to visual material depicting the lewd exhibition of the pubic area of a clothed child, appealing to the prurient interest in sex and not having

serious literary, artistic, political, or scientific value, we conclude the statute is a content-based restriction. *See Thompson*, 442 S.W.3d at 344–48.

E. Does the Statute Satisfy Strict Scrutiny?

Because section 43.262 is a content-based restriction on protected speech, it is subject to strict-scrutiny review to determine if the State has overcome the presumption of invalidity.[14] *See id*. at 344 (citing *Entm't Merchs. Ass'n*, 564 U.S. at 799); *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000) ("a content-based speech restriction" may stand "only if it satisfies strict scrutiny").

To satisfy strict scrutiny, content-based laws that regulate expression "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. In this context, a regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest. *Playboy Entm't Grp.*, 529 U.S. at 813. "If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny." *Lo*, 424

[14] Citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), the State argues that we should apply intermediate scrutiny to section 43.262 because it does not apply to matters of public concern. The State raises its argument that intermediate scrutiny should apply, here, on appeal, in the first instance. Notwithstanding that the State has waived this argument, we decline the State's invitation because *Synder* addressed whether the First Amendment could prohibit holding the defendant liable from claims of intentional infliction of emotional distress. *Snyder* made no pronouncement that content-based statutes, such as section 43.262, receive intermediate scrutiny.

S.W.3d at 15–16. The strict scrutiny analysis requires the State to identify "an actual problem in need of solving," and to show that it is important enough to justify suppressing speech. *See Brown*, 564 U.S. at 799. If the State has a compelling interest and has narrowly tailored its statute, the statute will be invalidated for overbreadth only if the challenger can show the statute continues to reach a real and substantial amount of protected speech, "judged in relation to its legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 769 (1982).

In its response to appellant's application for writ of habeas corpus, the State argued that it has a compelling interest "in protecting all children from sexual exploitation and the long-lasting harm that results from their depiction in child pornography." In its appellate brief, the State asserts the problem it is seeking to address is "protecting children from sexual abuse and exploitation" and that "Section 43.262 is necessary to close a loophole of child sexual exploitation that is currently left open by the existing child pornography statute."

No rational person will disagree that protecting children from sexual exploitation and their depiction in child pornography is a compelling government interest. *See Lo*, 424 S.W.3d at 20–21 ("The prevention of sexual exploitation and abuse of children constitutes a government objection of surpassing importance."). But, we observe that the State's compelling interest of protecting sexual abuse and exploitation is not supported by the statute's legislative history. The legislative

history of section 43.262 provides, "there is currently no disincentive for some criminals to possess or promote certain images portraying children depicted in a sexually suggestive manner" and the bill "seeks to address this issue by creating the offense of possession or promotion of lewd visual material depicting a child." HOUSE CRIM. JURISPRUDENCE COMM., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017). From the senate research center, the bill analysis states,

> Current state law does not contain statutes that criminalize the possession or promotion of child erotica images. Child erotica images portray an unclothed, partially[] clothed, or clothed child depicted in a sexually explicit manner indicating the child has a willingness to engage in sexual activity. Investigations of child pornography cases have revealed many child pornography collections also include child erotica images. In some cases, only child erotica images are discovered. In such instances, state charges cannot be pursued.

SENATE RESEARCH CTR., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017).

While the legislative history shows that investigations of criminals with child pornography collections also reveals collections of child erotica, the history is silent as to whether child erotica images, and specifically, visual material depicting the lewd exhibition of the pubic area of a clothed child—not child pornography—is an actual problem causing the sexual abuse or exploitation of children, thus necessitating the prohibition. *See Brown*, 564 U.S. at 799; *Lo*, 424 S.W.3d at 19 (stating that "the State may not punish speech simply because that

speech increases the chance that a 'pervert' might commit an illegal act 'at some indefinite future time.'").

In *Brown*, the Supreme Court held that California's law banning the sale of violent video games to minors without parental consent did not pass strict scrutiny. *Id*. at 805. The state recognized that it could not "show a direct causal link between violent video games and harm to minors," but argued that strict scrutiny could be satisfied based on the Legislature's "predictive judgment that such a link exists, based on competing psychological studies." *Id*. at 799. The Supreme Court rejected this argument, explaining that, under strict scrutiny, the state "bears the risk of uncertainty" and "ambiguous proof will not suffice." *Id*. at 799–800. Although the state submitted studies of research psychologists "purport[ing] to show a connection between exposure to violent video games and harmful effects on children," the Court held that the studies did not satisfy strict scrutiny because the studies had "been rejected by every court to consider them" and did not "prove that violent video games cause minors to act aggressively." *Id*. at 800.

Here, unlike in *Brown*, the State did not present any evidence or studies to show that the prohibited visual material in section 43.262, which neither encompasses obscenity, nor child pornography, has a direct causal link to the State's compelling interest of preventing the sexual abuse or sexual exploitation of

children.[15] If *Brown*'s rejection of competing psychological studies did not suffice, the State's proffer of no evidence to show how child erotica images cause sexual exploitation and sexual abuse of children does not rebut the presumption of the statute's invalidity and thus, the relevant language of the statute at issue here does not meet strict scrutiny. *See id*. at 800; *Alvarez*, 567 U.S. at 725 (stating that "First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest" and "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented"); *see also Playboy Entm't Grp.*, 529 U.S. at 819 (concluding that the "First Amendment requires a more careful assessment and characterization of an evil in order to justify a [sweeping] regulation" and emphasizing that government was required to present more than "anecdote and supposition" to prove an "actual problem"); *cf. Free Speech Coalition*, 535 U.S. at 250 ("Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."). We hold that the portion of section 43.262 at issue in this habeas appeal is an unconstitutional restriction on speech protected by the First Amendment and that the State has failed to rebut the presumption of the statute's invalidity.

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[15] *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011) ("But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'").

Overbreadth

Despite our conclusion that the statute is an invalid content-based restriction, we further address the unconstitutional reach of the statute.[16] *See Thompson*, 442 S.W.3d at 349. As we explained above, section 43.262 prohibits a person from possessing visual material depicting the lewd exhibition of the pubic area of a clothed child, that appeals to the prurient interests in sex, and has no serious literary, artistic, political, or scientific value. *See* TEX. PENAL CODE § 43.262.

The overbreadth doctrine is "strong medicine" to be employed with hesitation and only as a last resort. *See Thompson*, 442 S.W.3d at 349 (citing *Ferber*, 458 U.S. at 769). The overbreadth of a statute not only must "be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770. To be held unconstitutional under the overbreadth doctrine, a statute must be found to "prohibit[ ] a substantial amount of protected expression." *Free Speech Coalition*, 535 U.S. at 244. The danger that the statute

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[16] The State argues that appellant did not preserve an overbreadth challenge. We disagree. Appellant's application for writ of habeas argued that the statute restricts more speech than the constitution permits and that it violated the rights of too many third parties. Likewise, at the hearing on the writ application, appellant argued that section 43.262 was overbroad. At the hearing, the State recognized appellant's overbreadth challenge in closing when it argued that the statute was not overbroad. We conclude that appellant raised both an overbreadth challenge that the statute restricted more speech than the constitution permits and that it violated the rights of too many third parties. *See Thompson*, 443 S.W.3d at 348 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (contrasting technical "overbreadth" claim—that regulation violated rights of too many third parties—with claim that statute restricted more speech than the constitution permits, even as to the defendant, because it was content based)).

will be unconstitutionally applied must be "realistic." *Regan v. Time, Inc.*, 468 U.S. 641, 651 n.8 (1984). A statute is not rendered overbroad merely because it is possible to conceive of some impermissible applications. *Williams*, 553 U.S. at 303.

Appellant contends that a number of child Instagram "influencers" are in violation of section 43.262 and that the State is attempting to prosecute Netflix for exhibiting a movie that depicted children performing gymnastics. During the writ hearing, the State acknowledged the charges against Netflix, expressed that it could not explain another county's decision to prosecute, and believed Netflix's movie had political, literary, and artistic value.

We have already concluded that section 43.262 does not prohibit obscenity or child pornography. Instead, the statute applies to a person who knowingly possesses visual material depicting the lewd exhibition of the pubic area of a clothed child, otherwise known as child erotica, that previously was not prohibited and is not recognized as unprotected speech. *See* TEX. PENAL CODE § 43.262(b); SENATE RESEARCH CTR., *Bill Analysis*, Tex. H.B. 1810, 85th Leg., R.S. (2017).

A statute is likely to be found overbroad if the criminal prohibition it creates is of "alarming breadth." *See Stevens*, 559 U.S. at 474. Such is the case with the current statute. Even assuming that the visual material prohibited in section 43.262

has a direct causal link to the sexual abuse and sexual exploitation of children, it is not difficult to imagine the overbreadth of this statute.

The statute applies to any person—man, woman, teenager, law enforcement, judiciary, or school administrator—as long as the person knowingly possesses visual material depicting the lewd exhibition of the pubic area of a clothed child younger than 18. The statute does not differentiate if a teenager takes the offending photo of themselves, commonly referred to as a "selfie," and posts it publicly for anyone to see. *See* TEX. PENAL CODE § 43.262(d) (stating that it is no defense if depicted child consented to creation of visual material). In that instance, and based on the State's proffered compelling interest, if the visual material violates the statute, the teenager is both the victim (of sexual exploitation and sexual abuse) and the offender. And, any other person, whether that person is a collector of child erotica, parent, law enforcement, or educator, who knowingly possesses the visual material posted by the teenager, could also violate the statute.

As pointed out by appellant, at least one prosecutor has indicted Netflix for showing a film that violated the statute. As currently written, the statute could apply not only to Netflix, but to those persons who viewed the offending visual material.

Although the savings clause exempts visual material having serious literary, artistic, political, or scientific value, such exemptions matter little when a

substantial amount of protected speech is still chilled in the process. *See Free Speech Coalition*, 535 U.S. at 255 (stating that the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"); *Lo*, 424 S.W.3d at 22 (noting that supreme court upholds statutes prohibiting dissemination of material that is obscene for children, but will strike down, as overbroad, statutes that prohibit communication or dissemination of material that is indecent or sexually explicit).

Accordingly, we conclude that the criminal prohibition in section 43.262 is of "alarming breadth" that is "real" and "substantial." *See Stevens*, 559 U.S. at 474; *Ferber*, 458 U.S. at 770.

Conclusion

We hold that the portion of section 43.262 of the Texas Penal Code addressed herein is void on its face as it fails strict scrutiny and violates the First Amendment to the U.S. Constitution because it is overbroad. Thus, in appellate cause number 01-20-00859-CR, trial court cause number 1685846, we reverse the trial court's order denying appellant's requested habeas corpus relief and remand the case to the trial court to dismiss the indictment in trial court cause number 1623191.

In appellate cause number 01-20-00858-CR, trial court cause number 1623191, we grant the State's motion to dismiss for lack of jurisdiction because the record does not contain an appealable order in the underlying proceeding.[17] *See Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 649–50 (Tex. Crim. App. 2005); TEX. R. APP. P. 25.2(a)(2), 26.2(a).

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

Publish. *See* TEX. R. APP. P. 47.2(b).

[17] Before submission, the State filed a motion to dismiss, arguing that this Court should dismiss appellate cause number 01-20-00858-CR, trial cause number 1623191, which is the underlying criminal prosecution of section 43.262, because appellant's application for writ of habeas corpus was assigned to trial cause number 1685846, appellate cause number 01-20-00859-CR. Appellant did not respond to the motion to dismiss.

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